SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 696

CITY OF MIAMI BEACH,
a municipal corporation,

Petitioner,

vs.

VICTOR H. KUGEL and
FAYE A. KUGEL, his wife,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTORY STATEMENT

Respondents were Plaintiffs in Trial Court and Appellants in District Court of Appeal, Third District, State of Florida, and Respondents in the Supreme Court of the State of Florida.

The symbol T represents the Transcript in the Circuit Court.

STATEMENT OF THE CASE AND FACTS

The City Council of Miami Beach on April 13, 1966, denied Respondents' request to re-zone Respondents' property at the Northwest corner of Meridian Avenue and 17th Street, Miami Beach, Florida, from RE (Multiple family use) to BAA (Business use). Respondents' further alleged that RE classification of their property exceeded the bounds of necessity, was detrimental, arbitrary and unconstitutional, and lacked a substantial relation to proper health, morals, safety and welfare.

The neighborhood surrounding Respondents' property includes the following:

South:	Bordered by three (3) office buildings in BAAA district (commercial use district).
North:	Re zoning
East:	Bank and office building (commercial use district).
Southeast:	Burdines Department Store (commercial use district).
East:	Miami Beach Convention Hall complex with Southeast portion providing off-street parking facilities for approximately 2,763 cars.
South:	Off-street parking facilities for Lincoln Road Mall. BAA, (commercial use district).

Historically, as the community grew to the North, the use district under the zoning ordinances of the City of Miami Beach was changed to conform to the economic progress of the community. The area had changed so dramatically, that it became apparent that by the closing of Lincoln Road into a pedestrian mall, the character of 17th Street, which is one of the major east-west vehicular arteries, became, for all practical purposes, a commercial area, and by granting variances and by the zoning changes granted by the city to the property on 17th Street, the city reconstructed the neighborhood into a commercial area.

Testimony at trial disclosed that changes occurred during the preceding ten (10) years, including construction of the Lincoln Road Mall, off-street parking facilities to the North of the Lincoln Road Mall, construction of the convention hall complex, and conversion of 17th Street to a main artery of traffic.

Testimony disclosed that changes had occurred in the neighborhood in 1952 and 1955 and that traffic had increased to at least ten (10) times its former volume on 17th Street since the construction of the Lincoln Road Mall. (T. 71, 72, 169). Testimony also indicated that only a commercial building would be beneficial to the owners of the property. (T. 144).

Testimony (T. 80, 81, 90, 91, 92) showed that commercial use existed, including professional offices of lawyers and C.P.A.s, under RE zoning directly across the street. (T. 159). Testimony also disclosed that an office building would not be more obnoxious or detrimental to the area than a public utility building, and would be better than

an apartment house as far as parking was concerned. In addition, Testimony (T. 240) disclosed that the office building across the street did not have any adverse affect on the area.

The commercial use of its property by the Washington Federal Savings and Loan Association presented a clear-cut example of the effect of Respondents' proposed use since it is located across the street and is similarly situated with respect to surrounding zoning. The Washington Federal Savings and Loan Association's commercial use asserts a positive statement that no negative impact would result.

The Trial Court denied Respondents relief. On appeal, the District Court of Appeal, Third District, reversed the decision of the lower Court. (Decision of the District Court of Appeal, Third District, App. 3).

The Petitioners then petitioned the Supreme Court of the State of Florida for issuance of its Writ of Certiorari. The Florida Supreme Court denied Petitioner's petition. The Petitioners then petitioned the Florida Supreme Court for rehearing and for the first time, raised the provisions of the Fourteenth Amendment to the United States Constitution. This petition was denied. The Petitioners now petition this August Body for its Writ of Certiorari.

QUESTION PRESENTED

HAS THE PETITIONER AT ANY TIME IN THE PROCEEDINGS IN THE LOWER COURT PRESENTED ANY FEDERAL QUESTIONS OR PRESERVED ANY FEDERAL QUESTION TO INVOKE THE JURISDICTION OF THIS COURT?

ARGUMENT

The first and only instance in which the Petitioner has raised a question of equal protection of the law under the Fourteenth Amendment to the United States Constitution was in a Petition for Rehearing of the denial of the Florida Supreme Court to grant Certiorari, and that said Petition for Rehearing brought into play questions that were not raised in any of the lower Courts, and as such, by the Florida Rules of Appellate Procedure, could not be raised in the Supreme Court. Florida Appellate Rules, Rule 3.14,

> " . . . The Petition for Rehearing shall not assume a new ground or position from that taken in the original argument or briefs upon which the cause was submitted, and must set forth concisely, and without argument, the alleged omissions, oversight, causes or grounds on which it is based".

The Petitioner has set forth as his only grounds for jurisdiction " . . . violation of the Fourteenth Amendment to the United States Constitution".

That the Petitioner's grounds for jurisdiction are without merit, can be ascertained by his failure or inability on either ground to set forth what right under the Fourteenth Amendment he is being deprived of and his inability or failure to set forth in explicit terms, how the challenged decree violated the Fourteenth Amendment. In his second ground on page six, in which he alleged that he has been deprived of due process of law, he does not state in any terms, by any showing whatsoever, of how,

why, when or where, the Circuit Court of the Eleventh Judicial Circuit, In and For Dade County, Florida, the District Court of Appeal, Third District, State of Florida, and the Supreme Court of the State of Florida, have in any way deprived him of due process.

The Petitioner cites, *State of Alabama v. State of Texas*, 347 U.S. 272; *State of Rhode Island v. State of Louisiana*, 347 U.S. 950; *Federal Radio Commission v. Nelson Brothers, etc., Co.*, 289 U.S. 266 and *Pepper v. Pepper*, 66 So.2d, 280 at 284, implies to this Court that these cases hold that the Judiciary may not set aside within its exercise of constitutional powers, acts improperly exercised by the legislature. The Judiciary has not only the power, but the obligation and duty to set aside and vacate the improper exercise of power by the legislature. The law is so settled in this regard, that it would be an unnecessary exercise to cite case law to this effect.

The case cited by the Petitioner as to the alleged conflict with the law enunciated by the United States Supreme Court is the case of *Village of Euclid v. Amber Realty Company*, 272 U.S. 365, the facts show that the Respondent in that particular case, by injunctive procedures, attacked the entire comprehensive zoning law enacted by the municipality. It held in that circumstance, that the Respondent could not attack the entire comprehensive zoning law, but could attack the law as it applied to Respondent's particular premises.

The Petitioner urges upon this Court that the "fairly debatable rule" as enunciated by this Court in *Village of Euclid v. Amber Realty Company*, 272 U.S. 365, was not considered. Page 10 of the Petition, recites that the District Court of Appeal failed to apply the "fairly debatable rule". Page 8 & 9 App. The opinion of the District Court of Appeal states,

> " . . . the character of the property has already been changed by other actions *of the municipality* (emphasis ours). The zoning regulation in question, as applied to appellant's property, is arbitrary, unreasonable and cannot be characterized as 'fairly debatable'."

Consequently, the District Court of Appeal held and considered the question presented before this Court and found for the Respondent on the identical question presented before this Court.

The Supreme Court of the State of Florida answered the identical question presented by the Petitioner in his Petition for Certiorari and twice decided per curiam, that the "fairly debatable rule" was, and had been properly resolved by the District Court of Appeal.

All other cases cited by the Petitioner are completely without merit and relevancy to this matter.

CONCLUSION

It is apparent that there is no conflict in case law between the law in the State of Florida as enunciated in the District Court of Appeal and the Supreme Court of the State of Florida and the question cited by the Petitioner, and it is apparent also from the record, that the Petitioner had been exposed to the majesty of the law and has not been deprived of any right under the due process provision of the Fourteenth Amendment or any other provision thereunder.

Respectfully submitted,

MARTIN GREENBAUM

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief of Respondents in Opposition to Petition for Writ of Certiorari has been furnished to Raphael Steinhardt, Esq., Penthouse Suite, Concord Building, 66 W. Flagler Street, Miami, Florida 33130, and Joseph A. Wanick, Esq., and Ira M. Elegant, Esq., 1130 Washington Avenue, Miami Beach, Florida, 33139, Attorneys for Petitioner, this ____ day of November, 1968, by regular United States Mail.

MARTIN GREENBAUM